Supreme Court, U.S.
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No. 09-712

In The
Supreme Court of the United States

INGRID FELDERHOF,

Petitioner,

v.

JENKENS & GILCHRIST, P.C., ET AL.,

Respondents.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Fifth Circuit

BRIEF IN OPPOSITION BY GROIA & COMPANY

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QUESTION PRESENTED

Whether an exhaustive evidentiary hearing at which Petitioner appeared, represented by counsel, and presented testimony is sufficient to satisfy the requirements of due process under the Fifth and Fourteenth Amendments to the United States Constitution.

TABLE OF CONTENTS

Page

STATEMENT OF THE CASE 1

REASONS FOR DENYING WRIT 3

I. THE TRIAL COURT'S DECISION DOES NOT CONFLICT WITH SUPREME COURT DECISIONS ON THE ISSUE OF UNWED FATHERS INTEREST IN THEIR RELATIONSHIP WITH THEIR BIOLOGICAL CHILDREN 3

II. THE GEORGIA STATUTE ON DISCRETIONARY APPELLATE REVIEW FOLLOWING A DENIAL OF LEGITIMATION PETITIONS DOES NOT VIOLATE UNWED FATHERS DUE PROCESS RIGHTS 7

CONCLUSION 8

TABLE OF AUTHORITIES

Page

CASES

Binns v. Fairnot, 292 Ga. App. 336 (2008).....5, 6

Caban v. Mohammed, 441 U.S. 380, 99 S. Ct. 1760, 60 L. Ed. 2d 297 (1979).....3, 4

Dept. of Human Resources v. Phillips, 268 Ga. 316, 486 S.E.2d 851 (1997).....7

In re: Baby Girl Eason, 257 Ga. 292, 358 S.E.2d 459 (1988).....3, 4, 5

In re: L.C., 273 Ga. 886, 548 S.E.2d 335 (2001).....7

In the Interest of: A.C., a child, No. S09A0931, Supreme Court of Georgia (2009).....7

Lehr v. Robertson, 463 U.S. 248, 103 S. Ct. 2985, 177 L. Ed. 2d 614 (1983).....3, 4, 5

Quilloin v. Walcott, 434 U.S. 246, 98 S. Ct. 549, 54 L. Ed. 2d 511 (1978).....3

Stanley v. Illinois, 405 U.S. 645 (1972).....3

CONSTITUTIONAL PROVISIONS

U.S. Const. amend. V 8

U.S. Const. amend. XIV 8

STATUTES

O.C.G.A. § 5-6-35(a)(2) 7

O.C.G.A. § 5-6-35(a)(12) 7

TABLE OF AUTHORITIES – Continued

Page

RULES

S. Ct. R. 14 3

STATEMENT OF THE CASE

This action involves Petitioner's efforts to legitimate his then three (3) year old child. Petitioner contends that just because he is the biological father of the child, he has a constitutional right to legitimate the child and that he was denied due process of law when the court denied his claim.

The facts surrounding Petitioner's Petition for Legitimation and the trial court's denial are set forth in the Court's Final Order. App. 6a-12a.[1] Notably, the Trial Court found:

Petitioner and [Respondent] did have a relationship which produced a son born on June 19, 2005. App. 7a. Though present at the birth of the child, Petitioner herein did not provide any financial support or medical care during Respondent's pregnancy or hospitalization for the birth of the minor child despite repeated requests by Respondent. App. 8a. Further, Petitioner did not provide medical insurance for the minor child subsequent to his birth despite repeated requests by Respondent forcing the child to obtain state provided health care insurance coverage. App. 9a.

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[1] The Petition contains a three-page discussion entitled "STATEMENT OF THE CASE, A. Background of the March 26, 2009 Order." Pet. 2-4. These factual assertions are not supported by citations to the record or the opinions below, and instead are Petitioner's version of the facts, which Respondent disputes.

Petitioner did occasionally visit with the minor child by either traveling to the child or the minor child and Respondent traveling to Petitioner's residence. App. 8a. In 2005, there were approximately seven days; in 2006, approximately fifteen days; in 2007 approximately fourteen days; and nine days in 2008 when Petitioner visited with the minor child. Upon the filing of the Petition for Step-Parent Adoption in August of 2008, Petitioner ceased contact with the minor child because it was awkward. App. 8a-9a.

Petitioner inconsistently paid child support for the minor child, and had sent the minor child a plastic batman car and the movie "Polar Express" as gifts. App. 9a. However, Petitioner insignificantly increased the amount of the support being paid because of his refusal to obtain health insurance for the minor child after his birth and after Respondent's repeated requests for funds to care for their minor child. *Id.* Despite constant requests by Respondent for the Petitioner to take appropriate legal action for the sake of his child, he only did so after Respondent's husband filed the Petition for Step-Parent Adoption. App. 10a. Implicit in the court's findings is the conclusion that Petitioner had no intention of legitimating the child until he was compelled by the pending adoption proceeding to take action.

QUESTION PRESENTED

Did the Fifth Circuit err when it affirmed the District Court's denial of Petitioner's Motion to Vacate Order on Default and to Set Aside Final Judgment, based upon the District Court's finding that Petitioner's default was the result of Petitioner's deliberate and willful conduct?

LIST OF PARTIES

1. Ingrid Felderhof, Petitioner
2. Jenkens & Gilchrist, P.C., Respondent
3. John Felderhof, Respondent
4. Groia & Company Professional Corporation, Respondent

CORPORATE DISCLOSURE STATEMENT

Respondent, Groia & Company Professional Corporation, is a legal professional corporation organized under the laws of, and domiciled in, Canada. Groia & Company Professional Corporation has no parent corporation. All of the stock of Groia & Company Professional Corporation is privately held by an individual, and no public entity holds 10% or more of its stock.

TABLE OF CONTENTS

	Page
QUESTION PRESENTED	i
LIST OF PARTIES	ii
CORPORATE DISCLOSURE STATEMENT	ii
TABLE OF CONTENTS	iii
TABLE OF AUTHORITIES	iv
STATEMENT OF THE CASE	1
Groia's Representation Of The Felderhofs	1
The Interpleader Action	4
Petitioner's Willful And Deliberate Default	4
PROCEEDINGS BELOW	5
Petitioner's First Appeal	6
The District Court Remand	7
The Fifth Circuit Affirmance	8
REASONS FOR DENYING THE PETITION	8
A. There Is No Real Conflict Nor Important Federal Question	8
B. The Lower Courts' Decisions Do Not Conflict with *Pioneer*	9
C. The District Court Did Not Commit Error	19
CONCLUSION	21

TABLE OF AUTHORITIES

Page

CASES

Beitel v. OCA, Inc. (In re OCA, Inc.), 551 F.3d 359 (5th Cir. 2008) 16

Coomer v. Coomer, 2000 WL 1005211 (4th Cir. July 20, 2000) 16

Dix v. Johnson (In re Dix), 95 B.R. 134 (9th Cir. BAP 1988) 11, 15

Frost v. Subramanian (In re Subramanian), 2007 WL 2310026 (3d Cir. Aug. 14, 2007) 16

Graver Tank & Mftg. Co. v. Linde Air Prods. Co., 336 U.S. 271 (1949) 20

Jenkens & Gilchrist v. Groia & Co., 542 F.3d 114 (5th Cir. 2008) 14

New York v. Green, 420 F.3d 99 (2d Cir. 2005) 16

NLRB v. Hendricks County Rural Elec. Membership Corp., 454 U.S. 170 (1981) 20

Pioneer Investments Servs. Co. v. Brunswick Assocs. Ltd. P'ship, 507 U.S. 380 (1993) ..... *passim*

P.S. Johnson v. Gudmundsson, 35 F.3d 1104 (7th Cir. 1994) 14

TCI Group Life Ins. Plan v. Knoebber, 244 F.3d 691 (9th Cir. 2001) 17

United States v. Johnston, 268 U.S. 220 (1925) 20

Venegas-Hernandez v. Sonolux Records, 370 F.3d 183 (1st Cir. 2004) 15

Williams v. Meyer, 346 F.3d 607 (6th Cir. 2003) 16

TABLE OF AUTHORITIES – Continued

Page

RULES

Fed. R. Bankr. P. 9006(b)(1) 10, 11, 18

Fed. R. Civ. P. 60(b) 9, 16, 17, 18, 20

Fed. R. Civ. P. 60(b)(1) ..... *passim*

Fed. R. Civ. P. 60(b)(4) 5, 6

Fed. R. Civ. P. 13(f) 18

OTHER AUTHORITIES

Gressman, Eugene, *et al.*, *Supreme Court Practice* (9th ed. 2007) 9, 17

Moore, James Wm., *Moore's Federal Practice* (3d ed. 2009) 13

STATEMENT OF THE CASE

Groia's Representation Of The Felderhofs

On or about May 6, 1997 John and Ingrid Felderhof (together, the "Felderhofs") retained Joseph Groia ("Groia"), then a partner with the Canadian law firm of Heenan Blaikie, to provide advice and representation in respect of a variety of matters relating to Bre-X Minerals Ltd. ("Bre-X") and specifically to represent their personal interests regarding any Canadian securities or criminal investigations, proceedings or lawsuits. Contemporaneous with the retention of Groia, the Felderhofs retained the services of Jenkens & Gilchrist, a Professional Corporation ("Jenkens"), to provide similar advice and representation in the United States. On May 16, 1997 the Felderhofs entered into a Modified Legal Representation Agreement with Jenkens (the "Jenkens Modified Agreement"). In connection with the Jenkens Modified Agreement, Ingrid Felderhof (or Petitioner) executed a stock certificate for the entire 200 issued and outstanding shares in Travis Close, Inc. ("Travis Close"). The sole asset of Travis Close was and still is a house in Williamsburg, Virginia that the Felderhofs purchased with funds from the sale of John Felderhof's share of Bre-X and transferred to Travis Close. Felderhof transferred the house outright to Jenkens by way of the stock assignment, free and clear of any liens or encumbrances in

light of her obligations to Jenkens under the Jenkens Modified Agreement.[1]

Five days after the Felderhofs' entry into the Jenkens Modified Agreement, on May 21, 1997, the Felderhofs through John Felderhof entered into a Confidential Advice and Services Agreement with Groia and Heenan Blaikie[2] (the "Groia Retainer Agreement"). Because of the potential for vast and extensive litigation against the Felderhofs, one of Groia and Heenan Blaikie's primary concerns in entering into the Groia Retainer Agreement was to ensure that the Felderhofs provide a retainer to guaranty that there would be sufficient resources available for their defense. Thus, the Groia Retainer Agreement, similar to Jenkens Modified Agreement, provided for a non-refundable retainer whereby the Felderhofs authorized and instructed Jenkens to deliver one-half of the proceeds from the sale of any assets subject to the Jenkens retainer (including, without limitation, the stock in Travis Close, whose sole asset is the Williamsburg house) to Heenan Blaikie. Such proceeds were to be credited toward the

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[1] After the Felderhofs transferred ownership of the house to Jenkens in 1997, Jenkens exercised its ownership rights in the house and the house has not served as Petitioner's "residence," as she claims. *See* Pet. Br. at 6. Indeed, Groia & Company understands that since the inception of this litigation Petitioner has resided in the Cayman Islands.

[2] As of July 7, 2006 Heenan Blaikie waived any interest in the Groia Retainer and its interest in any earned fees and assigned them to Groia & Company.

Felderhofs' non-refundable general retainer with Heenan Blaikie.

Not surprisingly given the magnitude of the losses arising out of the Bre-X case, the Felderhofs came to be involved in a number of civil, criminal and regulatory proceedings in both the United States and Canada, including but not limited to, class action proceedings naming the Petitioner, Ingrid Felderhof, and a prosecution of John Felderhof by the Ontario Securities Commission. Groia & Company served as solicitors of record for Petitioner, until June 2006 and continued to represent John Felderhof until the Summer of 2007. As a direct result of Groia & Company's representation, the Felderhofs have been successful in defending numerous claims made against them, including an outright acquittal by Mr. Felderhof of eight securities charges for insider trading and participating in certain misleading press releases. Groia & Company is currently owed in excess of $900,000.00 for legal services it provided to the Felderhofs. Half of any proceeds received by Jenkens from the sale of the Williamsburg house will be allocated to reduce Petitioner's debt to Groia & Company. Groia & Company will still be owed a substantial sum after any such allocation.

The Interpleader Action

Nearly three years after its representation of the Petitioner had ended, in September 2006, Petitioner began making unwarranted claims to Jenkens that she owned the Williamsburg house. Given Petitioner's claims and the claims of other parties to the Williamsburg house or its proceeds (including those of Groia & Company and Mr. Felderhof), on November 14, 2006, Jenkens filed an interpleader action in the United States District Court for the Southern District of Texas seeking a declaratory judgment to determine the rightful owner of the Williamsburg home. Jenkens named Groia & Company, Mr. Felderhof and Petitioner as defendants.

Petitioner's Willful And Deliberate Default

After Jenkens filed the interpleader action, Petitioner engaged in an evasive and obstructive course of action designed to frustrate the judicial process and eschew the District Court's authority. Specifically, despite being personally served with the interpleader complaint, Petitioner "never filed an answer nor responded in any way to those pleadings." Pet. App. at 4-5.[3] Subsequently, Petitioner was served with a copy of the District Court's Order for Conference and Disclosure of Interested Parties, which

[3] Citations herein to "Pet. App." are to the Appendix submitted by Petitioner and included with her Petition for Writ of Certiorari.

directed her "to appear for a pre-trial conference and to file, within fifteen days, a certificate of persons or entities with a financial interest in the litigation." *Id.* at 5. Petitioner never filed the certificate despite the Court Order.

On December 15, 2006, due to Petitioner's willful evasion of the interpleader action, Jenkens filed a request for entry of default against Petitioner with the District Court and a hearing was scheduled for January 5, 2007. *Id.* Petitioner was served with the notice of the default request and related hearing, but she did not respond to the motion, nor did she appear at the hearing. *Id.*

On January 5, 2007, the District Court granted Jenkens' motion for entry of default judgment. Thereafter, Jenkens, along with defendants Groia & Company and Mr. Felderhof filed a joint motion for summary judgment asking the District Court to declare Jenkens the lawful owner of the Williamsburg house. On January 10, 2007, the District Court granted the joint motion and entered a final judgment declaring Jenkens as the sole owner of Travis Close and the Williamsburg house.

PROCEEDINGS BELOW

On February 22, 2007, Petitioner filed a motion with the District Court to set aside the entry of default and vacate the final judgment pursuant to Federal Rules of Civil Procedure 60(b)(1) and 60(b)(4).

After receiving the parties' briefs, affidavits and documentary evidence, the District Court denied Petitioner's motion. Pet. App. 15.

Petitioner's First Appeal

Petitioner appealed the District Court's dismissal of her motion to set aside entry of the default judgment to the Fifth Circuit Court of Appeals. On appeal, Petitioner first claimed that the District Court's judgment was void pursuant to Rule 60(b)(4), because she was never served with a summons. The Fifth Circuit found that the record supported the finding that Petitioner was served with the summons on the basis of, among other things, the process server's two affidavits averring that he personally served the complaint and summons on Petitioner. Pet. App. 18. Therefore, the Fifth Circuit held that the District Court did not err in denying Petitioner relief from the default judgment pursuant to Rule 60(b)(4). Petitioner does not appeal this ruling here.

Petitioner next claimed that she should be relieved from the default judgment pursuant to Rule 60(b)(1), which provides that a court "may relieve a party or its legal representative from a final judgment, order, or proceeding [on the grounds of] mistake, inadvertence, surprise or excusable neglect." Fed. R. Civ. P. 60(b)(1). On this question, the Fifth Circuit sought to determine whether good cause existed to set aside the default judgment and whether the District Court abused its discretion in denying

Petitioner's Rule 60(b)(1) motion. Pet. App. at 19-20. While the Fifth Circuit attempted to examine the record in light of certain equitable factors to determine whether good cause existed (*id.* at 19-30), it ultimately remanded the case to the District Court with instructions to issue a more detailed ruling should the District Court's initial ruling be supported by the record. *Id.* at 30-31.

The District Court Remand

On remand, the District Court once again denied Petitioner's motion to set aside the entry of the default judgment and set forth detailed findings supporting its decision. *See, generally,* Pet. App. at 3-10. First, the District Court found that Petitioner refused to communicate with Jenkens regarding the interpleader action and instructed her attorneys not to accept any communications regarding the litigation. *Id.* at 7-8 (finding that Petitioner instructed her attorneys to "'simply destroy'" any communications). Second, the District Court found that Petitioner "willfully ignored the [District Court's] ***repeated instructions and attempts at contact, willfully ignored opposing counsel's attempts to contact her relative to the proceedings, and willfully failed to respond to the claims against her***. . . ." *Id.* at 8 (emphasis added). Indeed, Petitioner only grasped "the serious consequences of the 'games' she played" with the District Court when it entered a final judgment. *Id.* In sum, Petitioner's "failure to respond was due ***not*** to any excusable neglect, but

was rather ***due to her calculated intent to eschew the [District Court's] authority, ignore the realities of litigation, and frustrate the judicial process***." *Id.* at 9 (emphasis added). On that basis, the District Court once again denied Petitioner's motion.

The Fifth Circuit Affirmance

On appeal, the Fifth Circuit affirmed the District Court's decision per curiam. Pet. App. at 2. The Fifth Circuit's standard of review on appeal was whether the District Court's findings were clear error and whether the District Court had abused its discretion. On September 14, 2009, the Fifth Circuit denied rehearing.

REASONS FOR DENYING THE PETITION

A. There Is No Real Conflict Nor Important Federal Question

Petitioner's petition for certiorari does not raise any question that warrants review by this Court. The Fifth Circuit's decision affirming the District Court's denial of Petitioner's Rule 60(b)(1) motion on the grounds that she (i) willfully ignored the interpleader action, (ii) exercised "deliberate disregard" for the District Court's instructions and (iii) played "games" with the District Court does not conflict with the decision of any other Court of Appeals. Nor does it conflict with any decision of this Court. Petitioner

thus has failed to satisfy the criterion of a circuit conflict that most frequently results in this Court granting certiorari. *See* Sup. Ct. R. 10(a); Gressman, Eugene, *et al.*, *Supreme Court Practice* 241 (9th ed. 2007) ("Still, there must be a real or 'intolerable' conflict on the same matter of law or fact, not merely an inconsistency in dicta or in the general principles utilized."). Moreover, the petition utterly fails to identify an important unresolved question of federal law that needs to be decided by this Court. *Id.* ("No longer is it enough, if it ever was, to allege a conflict among decisions without demonstrating that the conflict revolves around an 'important' question of federal law."). Rather, the issue that Petitioner raises (vacation of a default judgment under Rule 60(b)'s excusable neglect standard) has been considered in a consistent manner by the Courts of Appeals and this Court's review can add little, if anything, to the body of case law that exists. The case at hand turns upon its own intensive facts, particularly due to Petitioner's egregious conduct (as found by the District Court) and does not implicate important questions of federal law.

B. The Lower Courts' Decisions Do Not Conflict with *Pioneer*

Petitioner attempts to manufacture a conflict by arguing that the Fifth Circuit's affirmance of the District Court does not comport with this Court's decision in *Pioneer Investments Servs. Co. v. Brunswick Assocs. Ltd. P'ship*, 507 U.S. 380 (1993)

and therefore creates a conflict with decisions from other Courts of Appeals that have applied the standard articulated in *Pioneer*. In *Pioneer*, Brunswick (a creditor of Pioneer, the chapter 11 debtor) was required to file proofs of claim in order to participate in the distribution of Pioneer's estate. *Id.* at 383. After receiving notice of the meeting of the creditors, Brunswick hired an attorney who assured Brunswick that the situation was not urgent because the court had yet to set the deadline by which proofs of claim must be filed. *Id.* at 384. By the time that Brunswick's counsel discovered that the notice of the meeting of creditors had, in fact, provided notice of the deadline, Brunswick's proofs of claim were twenty days late. *Id.* Thereupon, Brunswick's counsel submitted the proofs of claim along with a motion requesting that the court permit the late filing on the basis of excusable neglect pursuant to Bankruptcy Rule 9006(b)(1).[4] *Id.*

The bankruptcy court refused the late-filed proofs of claim, finding that "excusable neglect" can only exist where a party's failure to timely perform a duty

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[4] Bankruptcy Rule 9006(b)(1) provides in pertinent part:

> [W]hen an act is required or allowed to be done at or within a specified period by these rules or by a notice given thereunder or by order of court, the court for cause shown may at any time in its discretion . . . (2) on motion made after the expiration of the specified period permit the act to be done where the failure to act was the result of excusable neglect.

Fed. R. Bankr. P. 9006(b)(1).

was due to circumstances beyond its reasonable control. *Id.* at 384. On appeal, the district court affirmed in part and reversed in part and required the bankruptcy court on remand to evaluate whether Brunswick's conduct constituted excusable neglect pursuant to a five factor test elucidated in *Dix v. Jophnson (In re Dix)*, 95 B.R. 134, 138 (9th Cir. BAP 1988). *Id.* at 385. Upon applying the five factor test on remand, the bankruptcy court once again denied Brunswick's motion and the district court affirmed. *Id.* at 385-86. On appeal, the Sixth Circuit Court of Appeals agreed with the District Court that "excusable neglect" was not limited to cases where the failure to act was beyond the movant's control and that the *Dix* factors were helpful guides in determining whether "excusable neglect" exists. *Id.* at 386. However, the Sixth Circuit reversed, on the basis that the bankruptcy court had misapplied one of the so-called *Dix* factors. This Court granted certiorari in order to resolve the conflict among the Courts of Appeals over whether excusable neglect (i) requires a strict showing that the delay was caused by circumstances beyond the movant's control as trumpeted by Pioneer or (ii) should be analyzed under a more flexible analysis, such as the *Dix* analysis endorsed by the Sixth Circuit. *Id.* at 387 & n.3.

In affirming the Sixth Circuit decision requiring a flexible analysis of excusable neglect under Bankruptcy Rule 9006(b), this Court applied a two-part analysis of what constitutes "excusable neglect." *First*, the Court sought to determine what constitutes

"neglect" and cited Webster's Ninth New Collegiate Dictionary for the plain meaning of "neglect." *Id.* at 388. The Court found that the definition establishes the "ordinary meaning" of "neglect" and indicates that Congress intended that "courts would be permitted, where appropriate, to accept late filings caused by inadvertence, mistake, or carelessness, as well as by intervening circumstances beyond the party's control." *Id. Second*, once a movant establishes such "neglect," it must then be determined whether such neglect is "excusable." *Id.* at 395. In the context of answering this latter question, the Court mentions four possible considerations that could be factored into the equitable determination of whether a party's "neglect" is excusable. *Id.* The considerations are as follows: (i) danger of prejudice to the debtor, (ii) length of the delay and its impact on the proceedings, (iii) the reason for the delay and (iv) whether the movant acted in good faith. *Id.*

Petitioner claims that the Fifth Circuit erred in the case at bar, because it failed to require the District Court to apply the foregoing factors to Petitioner's willful default and therefore, the Fifth Circuit's Rule 60(b)(1) analysis conflicts with *Pioneer*. Pet. Br. at 11-12. This claim is wrong for several glaring reasons.

First, to apply the *Pioneer* factors with regular uniformity to every Rule 60(b)(1) motion to determine if a party's neglect is excusable unnecessarily presumes that the first part of this Court's analysis under *Pioneer* (*i.e.*, whether neglect exists in the first

place) is always met. By definition, where a party's omission is caused by willful or deliberate conduct, there can be no neglect. *See Pioneer*, 507 U.S. at 388 (this Court defining "neglect" as including "inadvertence, mistake, or carelessness"). Indeed, with respect to "excusable neglect" under Rule 60(b)(1), *Moore's Federal Practice* states that:

> The principle that willful or deliberate conduct, including deliberate or persistent inattention to obligations, rules, or orders, mitigates against relief is not limited to the context of relief from default judgments. In any context, deliberate or willful conduct on the part of the person seeking relief from the judgment precludes, by its very nature, a finding of "mistake" or "inadvertence" or "surprise" or "excusable neglect."

12 James Wm. Moore, *Moore's Federal Practice* § 60.41[1][c][i] (3d ed. 2009). In the case at bar, the District Court definitively found that Petitioner willfully ignored the interpleader action and the orders of the District Court. *See* Pet. App. at 8 (Petitioner's "***willfulness*** included ***Felderhof's defiance*** toward orders of this Court") (emphasis added); *id.* ("Felderhof ***willfully ignored*** the Court's repeated instructions and attempts at contact, ***willfully ignored*** opposing counsel's attempts to contact her relative to the proceedings, and ***willfully failed to respond*** to the claims against her in this case") (emphasis added); *id.* at 9 ("Felderhof's failure to respond was due not to any excusable neglect, but was rather due to her ***calculated intent to eschew***

the Court's authority, ***ignore the realities of litigation***, and ***frustrate the judicial process*** relative to this matter") (emphasis added); *id.* ("Felderhof treated this litigation, and her responsibilities as a party to it, with ***blatant disregard***") (emphasis added); *id.* ("the Court finds that Felderhof acted ***willfully*** in refusing to properly participate in the litigation") (emphasis added). Neither *Pioneer* nor any other case suggests that a party's willful and deliberate conduct will be excused by other equitable factors.

Because Petitioner's omission was willful and not neglectful, there would be no reason for the District Court, nor the Fifth Circuit, to analyze (whether under the factors listed in *Pioneer* or some other flexible approach) whether such willful omission was excusable.[5] *See Jenkens & Gilchrist v. Groia & Co.*, 542 F.3d 114, 120 (5th Cir. 2008) (if the district court finds the movant's "default to be willful, then the district court need not make any other finding"); *P.S. Johnson v. Gudmundsson*, 35 F.3d 1104, 1117 (7th Cir. 1994) (district court did not abuse its discretion in entering default judgment where party's "course of conduct amounts to a ***flagrant and willful disregard*** for the court's scheduling orders, the Federal Rules of Civil Procedure . . . ") (emphasis

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[5] Nevertheless, the Fifth Circuit did, in fact, consider equitable factors substantially similar to those mentioned by this Court in *Pioneer* in Petitioner's first Fifth Circuit appeal, as discussed in Respondent Jenkens' Opposition Brief.

added); *cf. Venegas-Hernandez v. Sonolux Records*, 370 F.3d 183, 187 (1st Cir. 2004) (denying Rule 60(b)(1) motion where movant's "decision not to respond appears to have been ***willful***") (emphasis added). It bears repeating that this is not a case where Petitioner was merely negligent or shared some undefined measure of culpability with respect to her failure to respond. As the District Court emphatically repeated, Petitioner's conduct was "willful," "defian[t]," and "blatant," which goes far beyond mere negligence or culpability. Petitioner's actions sought to manipulate the legal process and disrespectfully snubbed the imprimatur of the District Court and the judiciary as a whole. Such a calculated course of conduct does not and can never constitute neglect.

Second, this Court certainly did not mandate that the four factors listed in *Pioneer* be applied with rigid precision to every case of a party's omission under Rule 60(b)(1), as Petitioner posits. The four factors were merely plucked from the Sixth Circuit's opinion (as originally articulated in *Dix*) from which the *Pioneer* appeal emanated. *See Pioneer*, 507 U.S. at 395 ("we are in substantial agreement with the factors identified by the Court of Appeals"). This Court did not endorse them as the only standard to be applied in every context in *Miranda*-like fashion. Indeed, with the multitude of varying fact-specific circumstances that arise under Rule 60(b)(1) (including compelling circumstances where the movant is willfully defiant to the district court, as in the case at bar), courts must be left with some flexibility in

their determination of what constitutes "excusable neglect." *See Pioneer*, 507 U.S. at 392 (excusable neglect is "elastic" concept); *id.* at 395 (determination of excusable neglect is "at bottom an equitable one"); *id.* (extending "flexible meaning" to excusable neglect).

Furthermore, with near uniformity, the Courts of Appeals post-*Pioneer* have applied equitable factors to cases arising under Rule 60(b)(1) that are comparable in substance to *Pioneer*, even if they do not cite *Pioneer* or organize the factors to be considered in exactly the same way. *See, e.g.*, *New York v. Green*, 420 F.3d 99, 108 (2d Cir. 2005) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *Frost v. Subramanian (In re Subramanian)*, 2007 WL 2310026, at *3 (3d Cir. Aug. 14, 2007) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *Coomer v. Coomer*, 2000 WL 1005211, at *4 (4th Cir. July 20, 2000) (factors to analyze under Rule 60(b) claim of excusable neglect include timeliness, prejudice, whether movant has a meritorious claim and whether there are exceptional circumstances); *Beitel v. OCA, Inc. (In re OCA, Inc.)*, 551 F.3d 359, 369 (5th Cir. 2008) (factors to analyze under Rule 60(b) claim of excusable neglect include willfulness, prejudice, whether a meritorious defense was presented and public interest); *Williams v. Meyer*, 346 F.3d 607, 613 (6th Cir. 2003) (factors to analyze under Rule 60(b)

claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim); *TCI Group Life Ins. Plan v. Knoebber*, 244 F.3d 691, 696 (9th Cir. 2001) (factors to analyze under Rule 60(b) claim of excusable neglect include culpability, prejudice and whether movant has a meritorious claim).

Would Petitioner have this Court believe that all of these Courts of Appeals have missed the *Pioneer* mark merely because the factors analyzed are not presented in exactly the same manner?[6] Certainly not. While the analyses of the Courts of Appeals may not include a citation to *Pioneer* and apply the precise rubric that it suggests, the decisions certainly do not conflict with *Pioneer*. Rather, they all apply flexible, equitable analyses to determine whether a party's omission constitutes excusable neglect – analyses that are substantially similar to that set forth in *Pioneer*. They also do not conflict with the decisions of other Courts of Appeals. Gressman, Eugene, *et al.*, *Supreme Court Practice* 242 (9th ed. 2007) ("A genuine conflict, as opposed to a mere conflict in principle, arises when it may be said with confidence that two

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[6] As Petitioner notes, certain Courts of Appeals have applied the *Pioneer* factors to cases of excusable neglect. Pet. Br. at 9-11. That certain courts under the peculiar facts of those cases have determined to apply such factors is of no moment here and does not create a conflict. In any event and as discussed previously, Petitioner's willful conduct precludes any finding of neglectfulness, the threshold requirement under *Pioneer*.

courts have decided the same legal issue in opposite ways, based on their holdings in different cases with very similar facts.").

Third, this Court in *Pioneer* never held that its analysis of excusable neglect under Bankruptcy Rule 9006 must apply to cases of excusable neglect under Rule 60(b)(1) outside of the bankruptcy context. Rather, this Court merely relied upon interpretations of excusable neglect under Rules 6(b), 13(f) and 60(b)(1) in formulating its analysis. Compelling reasons exist for not extending this Court's interpretation of excusable neglect under Bankruptcy Rule 9006(b) to cases interpreting excusable neglect under Rule 60(b)(1). In *Pioneer*, this Court justified its interpretation of "excusable neglect" under Bankruptcy Rule 9006 by arguing that the policies underlying Chapter 11 and the Bankruptcy Rules require it. *Pioneer*, 507 U.S. at 389. This Court went to great lengths to explain how the historical underpinnings of Bankruptcy Rule 9006(b) and its predecessors in the Bankruptcy Act require bankruptcy courts to analyze excusable neglect under a flexible analysis. *Id.* at 390 (under prior Bankruptcy Act, courts were "entrusted with the authority" "to accept tardy filings 'in accordance with the equities of the situation'") (citations omitted).

Indeed, in order to reconcile the joint aims of rehabilitating the debtor and avoiding forfeitures by creditors, bankruptcy courts must necessarily exercise broad equitable powers, including the power to allow late-filed claims under compelling

circumstances. This end can ostensibly be achieved through the *Pioneer* analysis, however, such end is not necessarily always appropriate in the context of traditional litigation. This is especially so in light of certain of the mitigating factors identified by the Court in *Pioneer* that are specific to bankruptcy cases, such as the fact that (i) Pioneer's plan of reorganization accounted for Brunswicks' claims in any event and (ii) that the notice of bar date was inconspicuously displayed in a notice of meeting of creditors, which is uncharacteristic of bar date notices. *Id.* at 398-99.

C. The District Court Did Not Commit Error

Petitioner claims that the Fifth Circuit erred, because it failed to find that the District Court committed error in making certain factual findings that led to its conclusion that Petitioner's default was willful. Specifically, Petitioner lists six findings and then attempts to explain why each such finding is erroneous. In an exercise of prudence, Respondent will not engage in a nuanced factual tit-for-tat with Petitioner in this Court.[7] Suffice it to say, the Fifth Circuit found that the District Court made its findings "[a]fter receiving briefing, affidavits, and documentary evidence." Pet. App. 15. The District

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[7] Respondent, Groia & Company, agrees with and hereby incorporates the Misstatements of Fact submitted by Respondent, Jenkens, in its Brief in Opposition.

Court had sufficient evidence before it to make its findings and conclude that Petitioner's default was willful. Likewise, Petitioner had ample opportunity to submit evidence and make arguments in support of her Rule 60(b) motion. The Fifth Circuit certainly did not err in affirming the District Court's decision, ostensibly finding that the District Court's findings were not erroneous and that it did not abuse its discretion in denying Petitioner' Rule 60(b) motion.

More importantly, however, this Court does "not grant a certiorari to review evidence and discuss specific facts." *United States v. Johnston*, 268 U.S. 220, 227 (1925); *see also NLRB v. Hendricks County Rural Elec. Membership Corp.*, 454 U.S. 170, 176 n.8 (1981) (improvident grant of cross-petition that presented "primarily a question of fact," "which does not merit Court review"); Sup. Ct. Rule 10 ("A petition for a writ of certiorari is rarely granted when the asserted error consists of erroneous factual findings . . . "). It is the responsibility of the Courts of Appeals to review and assess a record to determine if a district court committed error in making findings and this Court should not grant certiorari where findings receive the concurrence of a Court of Appeals. *See Graver Tank & Mftg. Co. v. Linde Air Prods. Co.*, 336 U.S. 271, 275 (1949) ("A court of law, such as this Court is, rather than a court for correction of errors in fact finding, cannot undertake to review concurrent findings of fact by two courts below in the ***absence of a very obvious and exceptional show of error.***") (emphasis added);

Pioneer, 507 U.S. at 397 ("Nor would we be inclined in any event to unsettle factual findings entered by a Bankruptcy Court and affirmed by both the District Court and Court of Appeals.") (citations omitted). Petitioner fails to show an obvious and exceptional show of error by the District Court and the Fifth Circuit sufficient to warrant this Court's grant of certiorari to review factual findings.

CONCLUSION

For these reasons, this Court should deny Petitioner's Petition for Certiorari.

Respectfully submitted,

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